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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 G.G., by and through his grandmother and
11 guardian, A.G.; A.M., by and through her
12 parent and guardian, L.M.; and
13 DISABILITY RIGHTS WASHINGTON, a
14 nonprofit membership organization for the
15 federally mandated Protection and
16 Advocacy Systems,

CASE NO. 3:22-cv-05651-RJB

ORDER ON PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

17 Plaintiff,

18 v.

19 JILMA MENESSES, in her official capacity
20 as Acting Secretary of the Washington
21 State Department of Health and Human
22 Services; and SUSAN BIRCH, in her
23 official capacity as Director of the
24 Washington State Health Care Authority,

Defendant.

This matter comes before the Court on the Plaintiffs' Motion for Preliminary Injunction.

Dkt. 14. The Court has considered the pleadings filed regarding the motion and the remaining record. While the Defendants filed a Notice of Intent to File Surreply by November 2, 2022, consideration of additional briefing is unnecessary to decide this motion.

1 The Plaintiffs in this case seek declaratory and injunctive relief regarding The Rainier
2 School (“Rainier”), a state-run, residential facility for people with intellectual and developmental
3 disabilities. Dkt. 1. The Plaintiffs contend that it is a dangerous place to live and fails to provide
4 for the health and safety of its residents. *Id.*

5 On September 29, 2022, the Defendants moved to dismiss the case. Dkt. 11. That same
6 day, the Plaintiffs moved for a preliminary injunction. Dkt. 14. The motion to dismiss was
7 noted for October 21, 2022 and the motion for preliminary injunction was noted for
8 consideration on October 28, 2022. *Id.*

9 On November 1, 2022, the Defendants’ motion to dismiss Plaintiff G.G. for lack of
10 standing was granted and his claims were dismissed. Dkt. 72. To the extent that Plaintiff
11 Disability Rights Washington asserted associational standing for all residents at Rainier (except
12 for those that live at Klamath Cottage or Naches Cottage (collectively “cottages”)), the
13 Defendants’ motion to dismiss Disability Rights Washington’s claims were dismissed for lack of
14 standing. *Id.* Further, the Plaintiffs’ claims for violations of their Fourteenth Amendment rights
15 and claims for violations of the Washington Law Against Discrimination were also dismissed.
16 *Id.* Accordingly, only Plaintiff A.M.’s and the other residents of the cottages’ (who are
17 represented by Plaintiff Disability Rights Washington) claims for violation of Title II of the
18 Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et. seq.* and the Rehabilitation Act
19 (“RA”), 29 U.S.C. § 701, *et. seq.* remain for purposes of the pending motion for preliminary
20 injunction.

21 To the extent the parties again raise issues related to standing or for failure to state a
22 claim in the briefing on this motion for preliminary injunction, the October 31, 2022 Order on
23 Defendants’ Motion to Dismiss (Dkt.) addresses these issues and those rulings are adopted here.
24

1 To the extent that the parties who do not have standing seek a preliminary injunction or to
2 the extent that an injunction is sought on claims that have been dismissed, the motion for
3 preliminary injunction (Dkt. 14) should be denied.

4 **DISCUSSION**

5 In their motion for Preliminary Injunction, the remaining Plaintiffs move for the
6 following relief as it relates to the residents of the cottages: (1) an injunction ordered the
7 Defendants to cease all admissions to the cottages and (2) “an injunction ordering Defendants to,
8 as soon as the court deems practicable, discharge Plaintiff A.M. from Rainier School to a service
9 setting that meets her assessed needs and is aligned with her expressed desires for location and
10 setting.” Dkt. 14.

11 **A. STANDARD**

12 Plaintiffs seeking a preliminary injunction must establish one of two tests. *All. for the*
13 *Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017). The first test requires plaintiffs to
14 show: (1) that they are “likely to succeed on the merits,” (2) that they are “likely to suffer
15 irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tips in [their]
16 favor,” and (4) “an injunction is in the public interest.” *Coffman v. Queen of Valley Med. Ctr.*,
17 895 F.3d 717, 725 (9th Cir. 2018)(citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7
18 (2008) (internal quotation marks omitted)). Under the second variant of the 9th Circuit’s test for
19 a preliminary injunction, the “sliding scale” version of the *Winter* standard, “if a plaintiff can
20 only show that there are serious questions going to the merits—a lesser showing than likelihood
21 of success on the merits—then a preliminary injunction may still issue if the balance of hardships
22 tips sharply in the plaintiff’s favor, and the other two *Winter* factors are satisfied.” *All. for the*
23 *Wild Rockies*, at 1217 (internal quotation marks and citations omitted).

1 **B. MOTION FOR PRELIMINARY INJUNCTION**

2 1. Whether Plaintiffs are Likely to Succeed on the Merits or Serious Questions
3 Going to the Merits

4 Plaintiff A.M. and Plaintiff Disability Rights Washington's (for the other cottage
5 residents) remaining claims are for violations of their rights under the ADA and RA. The
6 October 31, 2022 Order provides the requirements for claims under these statutes. For ease of
7 reference, those requirements are repeated here.

8 Title II of the ADA provides, in relevant part, that "no qualified individual with a
9 disability shall, by reason of such disability, be excluded from participation in or be denied the
10 benefits of the services, programs, or activities of a public entity, or be subjected to
11 discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the RA "similarly
12 prohibits disability discrimination by recipients of federal funds." *Payan v. Los Angeles Cnty.*
13 *Coll. Dist.*, 11 F.4th 729, 737 (9th Cir. 2021). Title II of the ADA and the RA "are interpreted
14 coextensively because there is no significant difference in the analysis of rights and obligations
15 created by the two Acts" aside from the RA's requirement that the program receive federal
16 funds, which is not at issue here. *Id.*

17 To prove a violation of Title II of the ADA or of the RA, a plaintiff must show that: (1)
18 they are a "qualified individual with a disability"; (2) they were "either excluded from
19 participation in or denied the benefits of a public entity's services, programs, or activities, or was
20 otherwise discriminated against by the public entity;" and (3) "such exclusion, denial of benefits,
21 or discrimination was by reason of [their] disability." *Duvall v. County of Kitsap*, 260 F.3d
22 1124, 1135 (9th Cir. 2001) (citing *Weinreich v. Los Angeles County Metropolitan Transp. Auth.*,
23 114 F.3d 976, 978 (9th Cir. 1997)).

1 Parties do not dispute that Plaintiff A.M. and the other cottage residents are “qualified
2 individual[s] with a disability.” The first element of a claim under both the ADA and RA are
3 met.

4 The second element, requires that the Plaintiffs point to evidence that the Defendants
5 denied or excluded A.M. and the other cottage residents from medical care or other benefit. The
6 parties do not dispute that the residents at the cottages (including A.M.) do not have the benefit
7 of federal oversight that residents of the other units of Rainier do. The Defendants point out that
8 the cottages are not required to be under federal oversight because they do not receive federal
9 funds and maintain that the cottages are under extensive state regulation. Dkt. 24. The Plaintiffs
10 do not point to any authority which supports their theory that a lack of federal oversight when
11 there is state regulation is a “denial of a benefit.”

12 Further, the Plaintiffs have failed to point to any competent evidence to support their
13 assertion that the cottage residents have been excluded from or denied medical care or other
14 treatment services that are offered at Rainier to residents of other units. In support of their
15 motion for preliminary injunction, the Plaintiffs point to the Declaration of Sue A. Gant, Ph.D.
16 Dkt. 15. She opines that “it is unlikely that the dangerous conditions in medical care and
17 behavior health supports that have been documented in [other units] at Rainier School do not
18 also exist for the residents of [the cottages].” Dkt. 15 at 30. Her opinion on this issue is not
19 sufficient. It is not clear that her opinion is based on “sufficient facts or data” as required by
20 Fed. R. Ev. 702(b). At a minimum, her opinion should not be afforded much weight.

21 The Plaintiffs have failed to make an adequate showing on the second element for a claim
22 under the ADA or RA, exclusion or discrimination. This opinion need not analyze the third
23 element.

At this stage in the litigation, the Plaintiffs have failed to show a likelihood of success on the merits or that there are serious questions going to the merits.

2. Whether Plaintiffs will Suffer Irreparable Harm Absent Relief

Further, the Plaintiffs have not shown irreparable harm absent relief the Court granting the first portion of the relief they seek. The first portion of relief that they seek (an injunction on further admissions to the cottages) is not connected to the harms the residents of the cottages allege they are suffering. It is not yet clear that A.M.'s requested relief, that she be moved to a facility of her choice, would resolve all the emotional and psychological harms she claims. The Plaintiffs have not shown irreparable harm absent relief.

3. Balance of Equities and Public Interest

At this stage in the litigation, the balance of the equities and the public interest do not favor granting the preliminary injunction.

C. CONCLUSION

The motion for preliminary injunction (Dkt. 14) should be denied without prejudice. The Plaintiffs have failed to make the requisite showing.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 1st day of November, 2022.

Robert Bryan

ROBERT J. BRYAN
United States District Judge